IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.435 OF 2001

IN

ARBITRATION PETITION NO.128 OF 1989

...

Faircot S.A ...Appellant

v/s.

Tata SSL Ltd. ...Respondents

And

Liverpool Cotton Association Ltd...Intervenor

...

Mr.D.J.Khambata Sr.Counsel with Mr.R.I.Chagla i.b M/s.Federal & Rashmikant for the Appellant.

Mr.Shyam Mehta with Ms.Neeta Dagli i/b M/s.Mulla & Mulla & C.B.C. for the Respondents.

Mr.K.Desai i/b Kartikeyan & Associates for the

Intervenor.

Mr.Dinesh Kumar A. Dubey for Ahmadabad Advance Mills.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 10TH OCTOBER, 2007

P.C.:

1. This Appeal is directed against the order dated 6/7th February, 2001 passed by the learned single Judge of this Court in Arbitration Petition No.128 of 1989. That petition was filed by the present Appellants for enforcement of an award, which according to the Petitioners was a foreign award. That petition was filed under the Foreign Awards (Recognition and Enforcement) Act, 1961. The learned single Judge has dismissed that petition.

2. The present Appellants had filed the Arbitration Petition No.128 of 1989 for filing of the award, which was at Exh.B to the petition, in this court and for issuance of show cause notice to the Respondents

to show cause why the award should not be filed. The Petitioners also prayed for conversion of the award into a decree. According to the Petitioners, a contract was arrived at for sale of 340 tons of Sudan raw cotton by the Petitioners to the Respondents through the local agent of the Petitioners in India namely M/s. Gill & Co.Ltd. According to the Petitioners, the number of Contract is F.1636 dated 18-1-1988. According to the Petitioners, the Petitioners forwarded copies of the contract duly singed by the Petitioners to their local agent. Copies of the contract were delivered to Mr.S.S.Stalekar of the Respondents. According to the Petitioners, thus a binding contract was arrived at between the parties. According to the terms of the contract, the cotton was to be shipped during the month of February, March, April and May, 1988. According to the Petitioners, the Respondents committed breach of this contract because of which the Petitioners suffered loss. There was an arbitration clause in the contract. The contract was subject to Rules & By-laws of the Liverpool Cotton Association Ltd. Liverpool. Therefore that arbitration clause was invoked and the matter was referred to arbitrator and the award was made by the

arbitrator. The arbitrator by the award directed the Respondents to pay an amount of US$ 138294.56 together with interest. It is for the enforcement of this award that the Petition was filed.

3. The petition was opposed by the Respondents. The principal ground of opposition was that there was no concluded contract between the parties. It was claimed that for the purpose of acceptance of the contract by the Respondents, as per the contract itself, contract had to be signed by the Respondents. Admittedly, the contract has not been signed by the Respondents. It was also the case of the Respondents that at no point of time the offer made by the Respondents was accepted by the Respondents. It was further the case of the Respondents that the Petitioners have given different dates on which, according to the Petitioners, a binding contract was arrived at between the parties.

4. The learned single Judge dismissed the petition holding that there was no concluded contract between the parties. The learned single Judge also held that the Petitioners had not been able to establish that there was a written contract of arbitration between

the parties.

5. This appeal is directed against that order. The learned Counsel appearing for the Appellants submits that the finding recorded by the learned single Judge that the requirement of the Rules of the Liverpool Cotton Association that the contract should be in the prescribed form and should be signed by both the parties is mandatory is a wrong finding. According to him, the form is merely directory. The learned Counsel further submits that a binding contract was arrived at between the parties on 19-1-1988 when on behalf of the Respondents an amendment was suggested in the contract and that amendment was accepted. The learned Counsel submits that the telex dated 2-4-1988 sent by the Respondents clearly shows that the Respondent had applied for the import licence for importing cotton, which shows that the contract was accepted by the Respondents and there was a concluded contract between the parties. The learned Counsel submits that it being a foreign award, the burden was entirely on the Respondents to show that the award was not enforceable. In support of this submission, he relied on the judgment of the Supreme Court in the case of Transocean Shipping Agency (P) Ltd. v/s.

Black Sea Shipping and ors, AIR 1998 SC 707.

6. The learned Counsel appearing for the Respondents, on the other hand, submits that so that the award in relation to which the petition was filed can be said to be a foreign award, it must be shown that the award has been made in pursuance of an agreement in writing for arbitration. According to the learned Counsel, there is no agreement in writing arrived at between the parties. On 18-1-1988 an offer was made by the Petitioners and that offer was delivered as per the affidavit of the Petitioners themselves at Ahmadabad to Mr.Stalekar for signature, but at no point of time even according to the Petitioners that contract was signed by Mr.Stalekar and therefore, according to the Respondents there is no concluded contract between the parties. It is submitted that so far as the conduct of the Respondents of making an application for import licence is concerned, even for consideration of the offer made by the Petitioners the import licence was necessary and therefore, the conduct of the Respondents of making an application for import licence cannot be construed to mean that there was a concluded contract between the parties.

7. Now, in the light of these rival submissions if the record of the case is perused, it becomes clear that the petition was filed before the learned single Judge under Section 7 of the Foreign Awards (recognition and Enforcement) Act, 1961 (hereinafter referred to as "Foreign Awards Act"). Perusal of Section 7 shows that an application can be filed under Section 7 for enforcement of a foreign award. The term "foreign award" is defined by Section 2 of the Act. It reads as under:-

> 2. In this Act, unless the context otherwise requires, "foreign award" means an award on differences between person arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India made on or after the 11th day of October, 1960-
>
> (a) in pursuance of an agreement in writing for arbitration to which the convention set forth in the Schedule applies, and
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> (b) in one of such territories as the Central

> Government being satisfied that reciprocal provisions have been made may, by notification in the official Gazette declare to be territories to which the said convention applies.

8. Perusal of the definition quoted above shows that in order that a particular award can be described as a foreign award, it must be shows that the award has been made by the arbitrator in pursuance of an agreement in writing for arbitration. It is, therefore, necessary for the Petitioners to establish, before the burden shifts to the Respondents, to show as to how and why the award is not enforceable, that there is an agreement in writing for arbitration between the parties. According to averments in the petition, that was filed before this court in paragraph 2 of the petition, the Petitioners state that a contract was arrived at between the parties on 18-1-1988. Then, it is stated,

"The Petitioner further says that along with a letter dated 10th February, 1988 addressed by the said local agents of the Petitioner, the Original of the said

Contract bearing No.F.1636 together with three copies thereof duly signed by the Petitioner were delivered to the Respondent by Hand Delivery and the same were duly received by one Mr.S.S.Stalekar of the Respondent. The Petitioner further says that the Respondent duly received, retained and accepted the said Contract bearing No.F.1636 dated 18th January, 1988."

9. Thus, copies of the contract were forwarded to Ahmadabad to Mr.S.S.Stalekar alongwith letter dated 10-2-1988. It is stated that the copies of the contract were duly received, retained and accepted by Mr.Stalekar. In this paragraph, the date on which the copies were delivered to Mr.Stalekar is not disclosed. The Petitioners had filed rejoinder before the learned single Judge. According to the statement made in the rejoinder on 18-1-1988, there were negotiations between the parties and agreement was arrived at on 19-1-1988 and amendment in the quality of the cotton was suggested by Mr.Billimoria of Tata Textile Group, Bombay. That amendment was accepted and then in paragraph 8(d), it is stated thus:-

(d) The said Mr.Billimoria of the said Tata Textile Group, Bombay requested the said Messrs. Gill & Co. Ltd. that the two contracts, one entered between the Petitioner and the said Swadeshi Mills Ltd. and the other between the Petitioner and the Respondent each for 340 tons of cotton be sent to Ahmedabad for signature and accordingly, the said contract dated 18th January, 1988 between the Petitioner and the Respondent was received by Mr.S.S.Stalekar of the Respondent from Messrs.Gill & Co. Ltd., having office at Ahmedabad, on 15th February, 1988.

10. From the above quoted statement made on oath by the Petitioners, it is clear that according to the Petitioners, Mr.Billimoria told the Petitioners that the agreements are required to be signed and therefore they should be sent at Ahemadabad. Therefore, copies of the contract were sent to Ahmadabad to Mr.Stalekar on 15-2-1988. From the comparison of paragraph 2 of the petition along with above quoted paragraph of the rejoinder, it is clear that in paragraph (2) there is no date disclosed as to when the offer was accepted by the Respondents.

It is clear from the rejoinder that the copies were delivered to Mr.Stalekar on 15-2-1988 and according to averment in paragraph 2 of the petition the agreement was arrived at on copies of the contract being received, retained and accepted at Ahemedabad by Mr.Stalekar. Therefore, it appears that in the petition it was the case of the Petitioners that the contract was arrived at between the parties on 15-2-1988. This is, in terms, contrary to the case of the Petitioners before the arbitrator and what is held by the arbitrator in their award. According to the award of the arbitrator, concluded contract came into existence on 19-1-1988. Thus, in the petition a stand contrary to the one taken before the arbitrator was taken by the Petitioners.

11. It is further to be seen that though it is true that in order to bring about the concluded contract between the parties, it is not necessary that the contract should be compulsorily signed by both the parties. But it is clear from the statement made in the rejoined quoted above that even according to Mr.Billimoria, signature of Mr.Stalekar on the contract was necessary for a concluded contract to be arrived at between the parties. It is nobody’s case

that at any point of time Mr.Stalekar has signed the contract. The case before the arbitrator was that the concluded contract was arrived at between the parties on 19-1-1988 at Bombay, whereas the stand taken in the petition filed before the learned single Judge and the rejoinder filed before the learned single Judge is that the contract was arrived at by delivery of copies at Ahmedabad on 15-2-1988.

12. It was contended that by the conduct of the Respondents of making an application for import licence shows that the Respondents had accepted the offer and the contract was arrived at between the parties. But it is common ground that for importing cotton into India as per the policy then in force, acquisition of import licence was necessary. It is also on record that the application that was made by the Respondents for import licence was a general application and that the Respondents had entered into contract for import of cotton with others also. In our opinion merely from the conduct of the Respondents of application for import licence an inference cannot be drawn that the Respondents had accepted the contract. It is, thus, clear from the record that it cannot be definitely said, in view of

the contradictory stands taken by the Petitioners themselves, that on a particular date at a particular pace an agreement in writing was arrived at between the parties and therefore, in our pinion, it can not be definitely said that the award for the enforcement of which the petition was filed, was a foreign award. Perusal of the judgment of the learned single Judge shows that the learned single Judge has given elaborate reasons for holding why the award is not enforceable. We see no reason to take a view different from the view taken by the learned single Judge, as we find that the conclusions that have been reached by the learned single Judge are possible conclusion to be reached on the basis of the material on record.

13. In the result, therefore, the Appeal fails and is dismissed. No order as to costs.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)